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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of Sections of the )  
Cable Television Consumer )  
Protection and Competition Act of )  
1992: Rate Regulation )  
(Fifth Notice of Proposed )  
Rulemaking) )

MM Docket 92-266

To: The Commission

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JUL 29 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

REPLY COMMENTS OF LIFETIME TELEVISION

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## SUMMARY

The record now before the Commission clearly provides ample support for modifying the going-forward rules in a manner that will create significant, even-handed incentives for operator investment -- primarily through license fee support -- in the development of quality programming. As an established advertiser-supported program service providing consumers with high value at low fees, Lifetime Television ("Lifetime") embraces the many comments advocating programming investment incentives that foster not only initial investment in newly added services, but also continued investment in existing services already carried on a regulated tier. The comments of Lifetime and others have explained, in particular, how the current rules threaten the viability of advertiser-supported program services that depend on broad-based carriage to provide consumers high value at low fees.

Lifetime therefore maintains that the record before the Commission warrants adoption of the following proposals:

- (1) Newly enhanced incentives for "adding" channels should apply only when the total number of channels offered on a regulated tier actually increases, and such incentives should apply in a corresponding manner to rate reductions for channel deletions.
- (2) The current approach for the incremental addition of a programming channel to a regulated tier creates inappropriate incentives to "switch out" low-fee services and replace them with high-fee services on regulated tiers of service; this approach should be replaced with a flat-fee mark-up of no less than 25 cents per subscriber for an added channel.

- (3) To provide incentives for continued investment in and carriage of existing services, the Commission should adopt a more meaningful mark-up on license fee increases, including a specified monetary minimum.
- (4) Any cap on annual rate increases triggered by increased license fees should be separate from any cap on increases triggered by channel addition pass-throughs, and either cap should apply only to the mark-up itself.
- (5) The FCC should not adopt any guidelines that would directly or indirectly encourage or sanction artificially inspired migration of existing advertiser-supported services to a la carte status.

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**REPLY COMMENTS OF LIFETIME TELEVISION**

Lifetime Television ("Lifetime"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, hereby sets forth its reply comments in connection with the Commission's Fifth Notice of Proposed Rulemaking in the above-referenced docket.<sup>1</sup> Lifetime submits that the record in this proceeding, consistent with Lifetime's own earlier comments, provides ample support for Commission modification of the going-forward methodology in order to provide operators with significant, even-handed incentives to invest in the development of quality programming<sup>2</sup> -- both through initial investment in newly added

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<sup>1</sup> Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation, MM Docket No. 92-266, 74 RR 2d 1077 (1994) ("Fifth NPRM" or "Second Order on Reconsideration").

<sup>2</sup> The statute requires that rate regulations operate so as to "promote" the availability of diverse cable program offerings and "ensure" that cable program options "continue to expand." Cable Television Consumer Protection and Competition Act §§ 2(b)(1), (3) (1992) ("1992 Cable Act"). See also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation, 9 FCC Rcd 1164, 1242 (1993) (going-forward rules must "provide sufficient incentives" for investment in "continued growth of cable television service").

services and through continued investment in existing services already carried on a regulated tier.<sup>3</sup>

**I. THE RECORD SUPPORTS ENHANCED INCENTIVES FOR CHANNEL ADDITIONS THAT DO NOT ARTIFICIALLY ENCOURAGE CABLE OPERATORS TO SUBSTITUTE HIGH-FEE SERVICES IN PLACE OF LOW-FEE SERVICES**

Lifetime is one of several commenters who have explained that the current rules make low-fee, advertiser-supported services particularly vulnerable to "switch-outs." When motivated solely by

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<sup>3</sup> See, e.g., Comments of Discovery Communications, Inc, MM Docket No. 92-266, at 3, 5 ("Discovery Comments"); Comments of Liberty Media Corporation, MM Docket No. 92-266, at 7 ("Liberty Media Comments"); Comments of the National Cable Television Association, MM Docket No. 92-266, at 6 ("NCTA Comments"); Joint Comments of Providence Journal Company, et al., MM Docket No. 92-266, at 3-6 ("Providence Journal Comments"); Comments of USA Networks, MM Docket No. 92-266, at 6-7, 10 ("USA Networks Comments"); Comments of Tele-Communications, Inc., MM Docket No. 92-266, at 22-23 ("TCI Comments") (all filed June 29, 1994) (all calling for neutral treatment under revised rules). See also Comments of Viacom International Inc., MM Docket No. 92-266, at 6-8 (filed June 29, 1994) ("Viacom Comments"); Discovery Comments at 3 (both calling for incentives that do not encourage operators to drop established services for the sake of adding new offerings).

Although Lifetime's comments here focus on rectifying the discriminatory impact of current going-forward rules on existing low-fee services, it should be readily apparent that an overwhelming number of commenters in this proceeding also concur with Lifetime's call for (1) limiting the scope of review for complaints triggered by programming and other external cost increases to the reasonableness of the increase at issue, not the entire rate structure, and (2) eliminating the overbroad review and needless delay in operator recovery of external cost increases on the basic tier. Comments of Lifetime Television, MM Docket No. 92-266, at 17-21 (filed June 29, 1994) ("Lifetime Comments"); see, e.g., Comments of Courtroom Television Network, MM Docket No. 92-266, at 16-17 ("Court TV Comments"); Liberty Media Comments at 16-18; Comments of Time Warner Cable, MM Docket 92-266, at 16-20 ("Time Warner Comments") (all filed June 29, 1994).

regulatory incentives, such substitutions offer no additional value to subscribers, but merely replace low-cost services with higher cost ones regardless of the quality or popularity of the programming provided by such existing services.<sup>4</sup> Since commenters are nearly unanimous in finding that the current 7.5% mark-up will fail to provide any incentive to operators for adding programming to the regulated tiers, most commenters have joined Lifetime in urging adoption of an even-handed approach based on a flat-fee mark-up for incremental net additions of program channels. This approach creates a true incentive for operators to add services to regulated tiers without artificially encouraging the switch-out or migration of low-cost, advertiser-supported existing services.

**A. Only A Net Increase In The Number Of Channels On A Regulated Tier Merits The Benefit Of Enhanced Programming Incentives For Added Services**

Other commenters share Lifetime's view that rules artificially encouraging switch-outs thwart the overall policy goal of encouraging development of broader program options.<sup>5</sup> Newly enhanced incentives for adding channels should thus apply, as

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<sup>4</sup> Lifetime's low cost to operators and its attractive demographics have created a very favorable cost-value ratio for operators who are able to offer the service inexpensively to subscribers through widely distributed tiers. See Lifetime Comments at 2-5. As an independent cable network, however, Lifetime enjoys none of the benefits of ready access to systems and financial support inherent in the vertically integrated operator-programmer relationships common to the industry. See id. at 2 n.2.

<sup>5</sup> See Discovery Comments at 7-8; Viacom Comments at 6-7.

Lifetime and others previously have explained, only when the total number of channels offered on a regulated tier actually increases.

Likewise, to protect consumers and programmers alike, Lifetime again urges the FCC to ensure that its channel addition methodology continues to apply in a corresponding manner for channel deletions. Like the current "network cost" adjustment, the same flat-fee adjustment for channel additions also should be passed through to subscribers as a rate decrease for any net reduction in channels on a regulated tier.<sup>6</sup> To do otherwise would simply encourage the switch-out of existing program services.

**B. Commenters Broadly Support Adoption Of A Flat Fee Mark-Up For Net Additions Of Program Services To A Regulated Tier**

Where operators actually increase the number of program services on a regulated tier, commenters widely agree that the flat-fee approach is "the simplest and most equitable way of achieving the desired 'neutrality'" among the various program services affected by cable rate regulation.<sup>7</sup> As its initial comments make clear, Lifetime wholeheartedly concurs.

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<sup>6</sup> Contra Time Warner Comments at 7 n.10 (suggesting that operators should not be required to deduct an incentive factor for deletion of a service that had been carried on a regulated tier prior to March 31, 1994).

<sup>7</sup> Comments of E! Entertainment Television, Inc., MM Docket No. 92-266, at 3 (filed June 29, 1994). See, e.g., Comments of Jones Education Networks, Inc., Docket No. 92-266, at 6 (filed June 29, 1994) ("JEN Comments"); Liberty Media Comments at 15-16; NCTA Comments at 8; TCI Comments at 22-23.



Lifetime has endorsed, among other options, the so-called "average margin" plan for adding a program service, which would afford operators a flat fee equal to the programming cost margins embedded in the benchmark rates.<sup>8</sup> The "competitive market" approach advanced by TCI also appears to be a well-reasoned and workable proposal.<sup>9</sup> Because it relies on "the mark-up that would be used by non-competitive systems if they faced effective competition and were not subject to regulation,"<sup>10</sup> the competitive market approach benefits from its testing of operators' actual behavior in the market and its consistency with the Commission's own overall approach to cable rate regulation. Regardless of the exact method used to arrive at the flat-fee mark-up, the FCC would be well supported by the record if it adopts a flat-fee mark-up of no less than 25 cents, at least on an initial basis.<sup>11</sup>

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<sup>8</sup> Lifetime Comments at 14 (supporting flat-fee approaches like Continental's "margin incentive plan").

<sup>9</sup> TCI Comments at 23-28.

<sup>10</sup> Id. at 23. For this reason, the "competitive market" mark-up also offers the significant benefit of rendering moot the required "offset" of operator revenues derived from advertising or promotional advances in connection with the addition of a new service. See id. at 26.

<sup>11</sup> See, e.g., USA Networks Comments at 10 (25 cent mark-up "significantly less" than prices paid by subscribers to other multichannel video providers); TCI Comments at 24 (choosing 25 cents as reasonable option, given economists' determination that the "competitive market" mark-up ranges between 21 cents to 34 cents); Court TV Comments at 15-16; Comments of the Cable Telecommunications Association, MM Docket 92-266, at 5 (filed June 29, 1994) (25 to 50 cents). See also Comments of Cablevision Industries Corporation, MM Docket No. 92-266, at 10 (filed June 29, (continued...))

**II. A MINIMUM MARK-UP ON LICENSE FEE INCREASES WOULD RESPOND TO THE WIDELY DECRIED LACK OF INCENTIVES FOR INVESTMENT IN EXISTING PROGRAM SERVICES, PARTICULARLY THOSE WITH LOW FEES**

There is little dispute that current incentives are inadequate for continued, let alone increased, operator investment in existing program services.<sup>12</sup> Regardless of how the FCC ultimately chooses to provide the necessary enhancements in the mark-up on license fee increases, Lifetime urges the Commission to recognize the necessity of a corresponding minimum mark-up approach -- and a separate cap, if any, for such mark-ups -- for the continued competitiveness of existing low-fee, high-value program services.

For low-fee services that typically seek commensurately small license fee increases of a few cents annually, a mark-up of 7.5% (or even a substantially greater percentage) is likely to offer a cable operator scant incentive to support the service's efforts to raise the value and quality of its program fare.<sup>13</sup> Thus, at the

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<sup>11</sup>(...continued)  
1994) (35 to 40 cents); JEN Comments at 6 (30 cents). It may be necessary to revisit the specific amount of the mark-up sometime in the future, perhaps on a periodic basis, to ensure that the mark-up is working to encourage the carriage of services on a regulated tier. See, e.g., Comments of USA Networks at 11; TCI Comments at 24.

<sup>12</sup> See, e.g., Discovery Comments at 8-10; NCTA Comments at 6-7; Providence Journal Comments at 3-6; Time Warner Comments at 6, all of which refute the unsupported, anomalous suggestion that the current 7.5 percent mark-up might somehow suffice for license fee increases. See TCI Comments at 29.

<sup>13</sup> Appropriately emphasizing the singular importance of programming among all cable operator investments, Discovery has  
(continued...)

very least, the Commission should make clear that the mark-up for investment in existing services will never fall below a specified monetary minimum. This mark-up approach could be derived on a basis similar to that for any average margin or other flat-fee formulation the agency adopts for marking up the cost of newly added channels.<sup>14</sup>

The record also supports Lifetime's suggestion that any annual cap on rate increases triggered by increased license fees for already carried program services should apply only to the mark-up and not to the underlying license fee increase.<sup>15</sup> Proposals to the contrary fly in the face of the 1992 Cable Act and the Commission's public interest determination that the actual cost of programming investment must be readily recoverable by cable operators, i.e., treated as an external cost. Furthermore, for the sake of ensuring that investment in existing services is not squeezed out by channel additions, Lifetime agrees with Viacom that the FCC's purposes would best be served by separating the cap for license fee increases from the cap for channel additions, rather than merging

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<sup>13</sup>(...continued)  
argued that the mark-up on programming should be significantly greater -- certainly not less -- than the current (or even an enhanced) general rate of return for cable operators. Discovery Comments at 9.

<sup>14</sup> See Viacom Comments at 8-9.

<sup>15</sup> See, e.g., id. at 9-10.

the two into "one aggregate cap."<sup>16</sup> This measure would buttress the effort to extend even-handed treatment under the going-forward rules to all program services, and thus avoid distorting cable operator programming investment decisions.

**III. THE COMMISSION SHOULD NOT ADOPT A LA CARTE GUIDELINES THAT WOULD AUTOMATICALLY ENDORSE THE MIGRATION OF ADVERTISER-SUPPORTED SERVICES OFF REGULATED TIERS**

In both its initial comments and this submission, Lifetime has made plain its strong opposition to any standards that would encourage or sanction artificially-inspired migration of low-fee, advertiser-supported services to a la carte tiers.<sup>17</sup> While some operators clearly seek greater latitude for such migration, none has denied that the viability of advertiser-supported services depends directly upon their ability to obtain and maintain broad distribution among cable system subscribers via carriage on regulated tiers.<sup>18</sup> The Commission should maintain an a la carte enforcement approach that mitigates, rather than automatically endorses, artificial incentives for migration.

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<sup>16</sup> See Viacom Comments at 9-10 (separate caps "appropriate and essential" given the "predictably more limited magnitude of the mark-up on license fee increases"). Again, each separate cap should apply only to the permitted mark-up and could not properly limit the pass-through of the underlying license fee or fee increase.

<sup>17</sup> See Lifetime Comments at 13-17.

<sup>18</sup> Accord USA Networks Comments at 7 (in regard to a la carte positioning, "cable programming services are not fungible").

Because the propriety of any one a la carting situation turns on specific facts, Lifetime continues to believe that the FCC's case-by-case approach is the best method for dealing with disputes over migration of program services from a regulated tier to a la carte status. The FCC's current ad hoc oversight approach, when promptly and vigorously pursued, affords the most equitable means for fully weighing the competing concerns of the parties involved. On the other hand, the Commission appropriately could -- and should -- provide guidelines, as Lifetime and others have urged, for operators seeking to move services back to regulated tiers without running afoul of the negative option rule or incurring some other liability.<sup>19</sup>

#### **CONCLUSION**

The record gathered to date in response to the Fifth NPRM makes clear that a flat-fee mark-up of at least 25 cents per subscriber, coupled with a minimum monetary mark-up on license fee increases, is the best approach for creating equitable incentives for investment in and carriage of all types of program services. This methodology would counteract existing artificial incentives for switch-outs that harm low-fee, advertiser-supported services and the increasingly wide viewing public they serve. The FCC should in no way embrace a methodology that undermines the ability


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<sup>19</sup> See, e.g., Lifetime Comments at 17 & nn.17-18; Discovery Comments at 10-11.

of services like Lifetime to continue to provide viewers with popular, quality programming for a low fee. Lifetime respectfully urges the Commission to act expeditiously in amending the current going-forward rules accordingly, so that all types of program services may flourish on broadly distributed regulated tiers.

Respectfully submitted,

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